IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05/08/2003

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

C.A.No.952 of 2002

Murugan .. Appellant

-Vs-

State by Inspector of Police
NIB CID, Salem. .. Respondent

This criminal appeal is preferred under Sec.374 of The Code of Criminal Procedure against the judgment of the Special Judge (NDPS Act), Salem made in C.C.No.242 of 1999 and dated 25.9.2000.

!For Appellant : Mr.R.C.Paul Kanagaraj

^For Respondent : Mr.V.Jaya Prakash Narayanan
Government Advocate (Crl. Side)

:JUDGMENT

What is challenged herein is the judgment of the learned Special Judge (NDPS Act), Salem made in C.C.No.242/99 wherein the appellant/ accused stood charged, tried and found guilty under Sec.8(c) read with 21 of the N.D.P.S. Act and sentenced to undergo R.I. for 10 years and to pay a fine of Rs.1.00 lakh in default to undergo 2 years R.I.

2. The brief facts necessary for the disposal of this appeal can be stated thus:

On 30.8.1999, P.W.1 Veerannan Sub Inspector of Police, NIB CID and P.W.4 Velliangari and teammates were on regular supervision. On information from an informer, they reached Thathakapatti gate. The accused was pointed to P.W.1 by the informer. P.W.1 introduced himself and questioned the accused. He asked the accused whether he was carrying contraband. He informed the accused that he wanted to effect a search. The right of the accused under the Act to be searched before a gazetted Officer or a Magistrate was also informed to him. The accused replied that he could be searched by P.W.1. P.W.1 arrested the accused in front of Ganesan. Inspector of Police, Anadhanapatti Police Station, Venkatesan, Head Constable and Krishnan, Head Constable. The accused was enquired in front of P.W.2 Elango and P.W.5 Rajendran. The consent given by the accused was reduced in writing by the Head Constable as dictated by P.W.1 and it was duly signed by the accused, marked as Ex.P1. On one side of the yellow colour bag marked as M.O.1, held by the accused, there was an advertisement by Prabu Jewellery, 150 Main Road, Salem. The polythene

bag which was inside the yellow colour bag contained brown colour material weighing 100 grams. P. W.1 put a hole in the polythene bag and took 1 gram of powder for sample and came to know that it was brown sugar. Two samples weighing 5 grams each were taken for chemical analysis, and the balance weighing 89 grams was tied separately under M.O.3. Ex.P3 is the seizure mahazar. The accused was arrested, and he gave a confessional statement under Ex.P2. A case in Crime No.68 of 1999 was registered under Ss 8 C and 21 of the NDPS Act. Ex.P4 printed FIR was sent to the concerned Court, and the documents were forwarded to the higher officials. Ex.P5 express report was forwarded to the Inspector of Police. The accused and the contraband were produced before the Court under Form 95 . The Court sample is marked as M.O.2. The bag containing the contraband received from the Forensic Lab is marked as M.O.4. P.W.6 Sankarapandiyan, Inspector of Police on receipt of the documents from P.W.1 on 30.8.99 at about 1.50 P.M., enquired the accused and recorded his statement. The statement of the accused was forwarded to the Judicial Magistrate No.IV, Salem. P.W.6 along with his teammates searched the house of the accused in front of the witnesses and found no incriminating materials. The search report is marked as Ex.P8. He prepared Ex.P9 sketch in the place of occurrence. The accused was remanded to judicial custody. He recorded statements from the witnesses. The material objects were sent to Forensic Lab through Court. P.W.3 Ezhilarasi, an Officer in the Forensic Lab received the sample on 6.9.1999 and tested the same. P.W.3 gave a report under Ex.P6 opining that the said sample contained Di Acetyle Morphine (Heroin). P.W.6 received Ex.P6 report. He examined P.W.3 and recorded her statement. On completion of the investigation, he filed a charge sheet against the accused under Ss 8C and 21 of NDPS Act.

3. In order to prove the charges levelled against the accused, the prosecution examined 6 witnesses and marked 9 exhibits and 4 material objects. After the evidence of the prosecution was over, the appellant/accused was questioned under Sec.313 of Cr.P.C. as to the incriminating circumstances found in the evidence of the prosecution witnesses, which he flatly denied as false. No defence witness was examined. Neither any exhibit nor any material object was marked on the side of the defence. On consideration of the rival submissions and scrutiny of the materials, the trial Court found him guilty under S.8C read with 21 of the NDPS Act and sentenced him to undergo imprisonment, as stated supra. Hence, this appeal.

4. Arguing for the appellant, the learned Counsel Mr.R.C.Paul Kanagaraj interalia raised the following submissions:

The lower Court has not considered the entire evidence to base a conviction. It is pertinent to note that the information, by which the Inspector arrested the accused and seized the contraband, was neither reduced in writing nor sent to the immediate superior officer. The same is violative of Sec.42(2) of the NDPS Act, and on that ground alone, the trial became vitiated. P.W.1 after the alleged seizure, handed over the property to P.W.6, and P.W.6 has not affixed the seal on the properties, which was violative of Sec.55 of the NDPS Act. It remains to be stated that there is no report under Sec.57 of the Act sent by P.W.1 to his immediate superior regarding seizure and arrest. In view of the non-compliance of Sec.57 of the Act, the conviction against the appellant is bad in law. P.W.4 has stated that the Inspector of Police from Annathanapatti Police Station arrested the accused, which is contrary to the evidence of P.W.1, who deposed that he has arrested

the accused. It is pertinent to note that there is no independent corroboration regarding the alleged search and seizure. According to P.W.4, he brought the accused to his vehicle and prepared the mahazar in that vehicle. But a reading of the evidence of P.W.1 would indicate that the preparation of mahazar and seizure had been done on the spot itself. In view of the above said non-compliance of the provisions of the Act, the appellant/accused is entitled for an acquittal.

5. Added further the learned Counsel for the appellant that the entire trial is vitiated, since the appellant/accused was not properly questioned under Sec.313 of Cr.P.C. informing him the actual incriminating circumstances found in the evidence of the prosecution witnesses, and thus a valuable right of the accused was taken away, and the same has caused prejudice to him, and hence, on that score also the judgment of the lower Court has got to be set aside.

6. The learned Government Advocate (Criminal Side) opposed those contentions of the appellant's side strongly by stating that the trial Court only on proper appreciation of the evidence available, has found him guilty; that the prosecution has clearly proved the illegal possession of the contraband by the accused at the time of search, and apart from that, all the procedural formalities as contemplated under the NDPS Act had been strictly complied with by the officials. Added further the learned Government Advocate that the contention of the appellant's side that the trial Court has not properly examined the accused under Sec.313 of Cr.P.C. is not correct, and no prejudice has also been caused to him, and hence, the judgment of the lower Court has got to be sustained.

7. On careful analysis of the entire materials available and consideration of the rival submissions, the Court without going into the merits or otherwise of the rival contentions as to the merits of the case and as to the question whether the mandatory provisions of the NDPS Act were strictly followed by the officials at the time of the alleged search and arrest, has to set aside the judgment of the Court below on the short ground that the trial Court after the completion of the evidence on the side of the prosecution has neither properly framed the questions nor put them to the appellant/accused so as to make him understand of the incriminating circumstances found against him in the evidence adduced by the prosecution, as envisaged under Sec.313 of Cr.P.C.

8. The learned Counsel for the appellant brought to the notice of the Court certain vital questions which were not properly framed. It is true that questioning under Sec.313 of Cr.P.C. as to the incriminating circumstances in the evidence of the prosecution witnesses was intended to make the accused understand what was the evidence adduced against him by the prosecution witnesses. If the incriminating circumstances found in the evidence of the prosecution witnesses were not put to the accused under Sec.313 of Cr.P.C., they should be completely excluded from consideration, since the accused was not given any chance to explain them. This Court has uniformly taken the view that unless the circumstance appearing against the accused is put to him in his examination under Sec.313 of Cr.P.C., the same cannot be used against him. Needless to say that it is a valuable right available to him, and it is not an empty formality. The Apex Court has held in a decision reported in AIR 1962 SUPREME COURT 1239 (RAMA SHANKAR SINGH AND OTHERS V. STATE OF WEST BENGAL) thus:

"Duty is thereby imposed upon the Court to question the accused generally in a case after the witnesses for the prosecution have been examined to enable the accused to explain any circumstance appearing against him. This is a necessary corollary of the presumption of innocence on which our criminal jurisprudence is founded. The object of the section is to afford to the accused an opportunity of showing that the circumstance relied upon by the prosecution which may be prima facie against him, is not true or is consistent with his innocence. The opportunity must be real and adequate. Questions must be so framed as to give to the accused clear notice of the circumstances relied upon by the prosecution, and must give him an opportunity to render such explanation as he can of that circumstance. Each question must be so framed that the accused may be able to understand it and to appreciate what use the prosecution desires to make of the evidence against him. Examination of the accused under S.342 is not intended to be an idle formality, it has to be carried out in the interest of justice and fair play to the accused: by a slipshod examination which is the result of imperfect appreciation of the evidence, idleness or negligence the position of the accused cannot be permitted to be made more difficult than what it is in a trial for an offence. This Court pointed out in Ajmer Singh v. State of Punjab, 1953 SCR 418 : (AIR 1953 SC 7 6) that "it is not a sufficient compliance with the section (S.342 Code of Criminal Procedure) to generally ask the accused that having heard the prosecution evidence what he has to say about it. He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and the questions must be fair and must be couched in a form which an ignorant or illiterate person may be able to appreciate and understand." The examination by the Sessions Judge of the appellants was perfunctory, but as observed in Ajmer Singh's case, 1953 SCR 418 : (AIR 1953 SC 76) every error or omission in complying with S.342 does not vitiate the trial. "Errors of this type fall within the category of curable irregularities and the question whether the trial has been vitiated depends in each case upon the degree of error and upon whether prejudice has been or is likely to have been caused to the accused". To the questions asked by the Judge, the answers given by the appelants were either "I am innocent" or " the story is false". Failure on the part of the Sessions Judge to split up the questions so as to deal with each distinct feature or material piece of evidence separately, however, does not, in the circumstances of the present case, justify an inference that prejudice was thereby caused to the appellants. Counsel for the appellants has not been able to suggest, having regard to the line of cross-examination adopted and the criticism of the evidence of the prosecution witnesses offered by him, what explanation besides complete denial of the prosecution story, the appellants could have offered in answer to the questions relating to the different circumstances and pieces or features of evidence on which the prosecution relied. It is true that the prosecution strongly relied upon two circumstances against Bimala (1) that when she came out of the house of Ramdeo Ahir, she had a bloodstained knife in her hand and (2) that when she was arrested from the godown of Bhola Singh, the knife was in her hand. To these matters of evidence attention of the accused Bimala does not appear to have been invited. Similarly, attention of Ram Shankar to the evidence that when he came out of the room of Ramdeo Ahir, he had a knife in his hand was not

invited. But we have already observed beyond a bare denial, the learned counsel was unable to suggest any other answer which the accused could give to these pieces of evidence even if they had been specifically put to them. It is also to be noticed that the plea that the appellants had not been properly examined under S.342 of the Code of Criminal Procedure was not raised before the High Court : at least there is no reference in the judgment of the High Court to any such argument. Failure to comply with the provisions of S.342 is an irregularity; and unless injustice is shown to have resulted therefrom a mere irregularity is by itself not sufficient to justify an order of retrial. The appellate court must always consider whether by reason of failure to comply with a procedural provision, which does not affect the jurisdiction of the court, the accused have been materially prejudiced."

9. In the instant case, the lower Court has not framed the necessary questions regarding the contraband, the very subject matter of the case, and hence, it has caused prejudice to the interest of the accused. Therefore, in the absence of proper framing of question and putting the same to the accused in respect of the vital aspects of the matter, in particular the contraband in question marked as M.O.1 and in consideration of the valuable right of the accused, the Court has to necessarily set aside the judgment of the Court below and remand the matter back to the trial Court for disposal in accordance with law.

10. In the result, this criminal appeal is allowed, setting aside the judgment of the lower Court. The matter is remitted back to the trial Court with a direction to keep the evidence already recorded by it, proceed with the questioning of the appellant/accused under Sec.31 3 of Cr.P.C. and dispose of the case in accordance with law within a period of two months from the date of receipt of copy of this judgment.

Index: Yes
Internet: Yes

To:

1) The Special Judge (NDPS Act), Salem.
2) The Principal Sessions Judge, Salem.
3) The Superintendent, Central Prison, Vellore.
4) The Public Prosecutor, High Court, Madras.
5) The D.I.G. of Police, Chennai 4.
6) Mr.V.Jaya Prakash Narayanan, Government Advocate (Crl. Side), High Court, Madras.
7) The Inspector of Police, NIB CID, Salem.
8) The Section Officer, Criminal Section, High Court, Madras

nsv/